

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NEW YORK FUEL TERMINAL CORPORATION :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the :
Tax Law for the Period March 1, 1984 through :
April 30, 1984. :

In the Matter of the Petition :
of :
NEW YORK FUEL TERMINAL CORPORATION :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the Tax :
Law for the Period April 1, 1989 through :
April 30, 1989. :

DETERMINATION
DTA NOS. 810139,
810140 AND
810253

In the Matter of the Petition :
of :
NEW YORK FUEL TERMINAL CORPORATION :
for Revision of a Determination or for :
Refund of Sales and Use Taxes under Articles :
28 and 29 of the Tax Law for the Period :
April 1, 1989 through April 30, 1989. :

Petitioner, New York Fuel Terminal Corporation, 251 Lombardy Street, Brooklyn, New York 11222-3705, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period March 1, 1984 through April 30, 1984 (DTA No. 810139); a petition for revision of a determination or for refund of motor fuel tax under Article 12-A for the period April 1, 1989 through April 30, 1989 (DTA No. 810140); and a

petition for revision of a determination or for refund of sales and use taxes for the period April 1, 1989 through April 30, 1989 (DTA No. 810253).

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on April 11, 1996 at 9:15 A.M., with all briefs due by August 20, 1996. Petitioner was represented by Carl S. Levine, Esq. The Division of Taxation was represented by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel). All briefs were filed by August 20, 1996, which date commenced the six-month period for issuance of this determination.

ISSUES

I. Whether petitioner, a registered motor fuel distributor, has shown it is entitled to a motor fuel tax credit for motor fuel it sold to a dealer who resells motor fuel to exempt agencies.

II. Whether petitioner's and the dealer's failure to follow the procedural regulations (20 NYCRR former 411) to obtain a motor fuel tax credit for exempt sales bars petitioner from taking the credit.

III. Whether petitioner may take a credit against its motor fuel tax liability for prepaid motor fuel tax on motor fuel sales deemed uncollectible bad debts.

IV. Whether petitioner established reasonable cause for taking a credit on its April 1989 return for prepaid sales tax on motor fuel sales deemed uncollectible bad debts.

FINDINGS OF FACT

1. Petitioner, New York Fuel Terminal Corporation ("NYFT"), was a registered New York State motor fuel distributor during the relevant period in question. It was engaged in the importing, storage, distribution, purchase and sale of gasoline and other petroleum products.

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2. From January 1984 through April 1984, NYFT had made sales of motor fuel to Tunyung Oil Corporation ("Tunyung"), an unregistered dealer in motor fuel which resold motor fuel to municipalities and other customers which were exempt from Article 12-A tax.

3. On its motor fuel distributor reports (Form MT-104) for the month of March 1984 and for the month of April 1984, NYFT listed on line 18 of each report as net taxable sales 1,077,856 gallons in March 1984 and 887,574 gallons as net taxable sales in April 1984. In brief, petitioner asserted that these gallons represented the total number of gallons sold to Tunyung during this period. On line 22A of each report, NYFT listed 1,030,970 gallons and 370,069 gallons for March 1984 and April 1984, respectively, of motor fuel attributable to dealer sales to the State and municipalities. NYFT asserted that the listed credit on line 22A related to motor fuel sold during the months of March and April of 1984 to Tunyung that was resold by Tunyung to agencies exempt from Article 12-A tax.

4. On its delivery invoices to Tunyung for the months of January through April of 1984, NYFT would include all taxes in its charges for motor fuel purchased by Tunyung. Underneath NYFT's name and address on the delivery invoices, is a blank space next to the heading "delivered to" and Tunyung's name and address next to the heading "sold to". NYFT's delivery invoices for Tunyung indicate that for the months of January through March of 1984, NYFT charged Tunyung for 713,927 gallons of no-lead gasoline, 397,983 gallons of regular gasoline, 1,999 of super no-lead gasoline and 2,999 gallons of oil (1,116,908 gallons). The delivery invoices for the month of April 1984 indicate NYFT charged Tunyung for 193,952 gallons of no-lead gasoline and 50,467 gallons of regular gasoline (244,419 gallons).

5. Tunyung presented to NYFT Forms MT-338 reporting sales of motor fuel to exempt entities for the months of March and April of 1984 along with exemption certificates from those entities. The MT-338 forms list NYFT as the distributor for those sales and the reports are signed by John Quock, Tunyung's principal. Tunyung reported sales to government agencies on

its MT-338 forms for the separate months of January, February, March and April of 1984, in the following amounts:

January 1984	351,772.0 gallons
February 1984	333,914.4 gallons
March 1984	345,284.0 gallons
April 1984	370,069.0 gallons

The sum of the gallons listed on the MT-338 Forms for January 1984 through March 1984 is 1,030,970.0. Listed on Form MT-338 for the month of March were sales made in February and January; and listed on Form MT-338 for the month of April were sales made in January, February and March.

6. The exemption certificates attached to the MT-338 forms correspond to the amount of motor fuel gallons listed for the individual organizations on the MT-338 forms for the months of January, February and March of 1984. However, the only exemption certificates attached to the MT-338 form for the month of April 1984 to verify the sales by Tunyung to those organizations were the following:

<u>gallon</u>	<u>governmental agency</u>
14,837.0	N.Y.C. Dept. of Environmental Protection
22,678.0	N.Y.C. Dept. of General Services
486.0	N.Y.C. Canarsie Cemetery
128,159.0	N.Y.C. Police Department
500.0	N.Y.C. Brooklyn Botanical Garden
1,544.0	N.Y.C. Brooklyn Public Library
12,955.0	N.Y.C. Fire Department
29,611.0	N.Y.C. Emergency Medical Service
4,199.0	N.Y.C. Sanitation Department
6,326.0	N.Y.C. Dept. of Transportation
13,191.0	N.Y.C. Parks Department
1,420.0	N.Y.C. Staten Island Rapid Transit Operating Auth.
<u>16,500.0</u>	N.Y.C. Transit Authority
252,406.0	total

7. Although NYFT would bill Tunyung for all taxes on the delivery invoices, NYFT would credit Tunyung for the taxes on motor fuel sold to exempt organizations, as indicated on the MT-338 forms, by reducing Tunyung's receivable and sales accounts on NYFT's books.

8. At hearing, Abbey Blatt testified on behalf of petitioner. Mr. Blatt is a certified public accountant who assisted NYFT in setting up its books and records and has represented

NYFT since 1981 as well as its affiliates since 1964. Mr. Blatt gave direct testimony concerning NYFT's delivery of motor fuel sold to Tunyung as follows:

"Q. Now, are you personally familiar with how the product sold by New York Fuel to Tunyung as is reflected on these various documents was in fact delivered, physically delivered to the municipalities?

"A. I believe that Tunyung used M & Q Trucking to make those deliveries, to the best of my recollection.

"Q. You were there at the time?

"A. Yes. M & Q Trucking was the entity that provided service to deliver gasoline to various customers of New York Fuel.

"Q. It was a trucking company?

"A. That's correct.

"Q. They had a -- do you recall how many trucks they had, approximately?

"A. Probably around 14, 15.

"Q. And M & Q Trucking was one of your clients; was it not?

"A. Yes, they were.

"Q. Was that a way, then, by controlling the delivery, was that not a way for New York Fuel to make sure that the product sold to Tunyung in fact was delivered to municipalities rather than sold off to somebody else where there would be a problem with the taxes?

"A. I believe that they became aware of where it was going because their trucks delivered it; but I can't be guaranteed all of them. They received supporting documents, is what they based it on.

"Q. At the time New York Fuel was satisfied that the documents that it was receiving, that it accepted those in good faith at the time that in fact the resales were to the City of New York?

"A. That's correct." (Tr. pp. 50-51.)

M & Q Trucking was an affiliate of NYFT. NYFT could not sell the motor fuel directly to the exempt organizations itself because the municipalities awarded the various sales contracts by bid to Tunyung.

9. The Division of Taxation ("Division") conducted an audit of NYFT's March 1984 MT-104 Motor Fuel Distribution Report and of NYFT's April 1984 MT-104 Motor Fuel

Distribution Report. It appears that during this audit the Division reviewed the MT-338 forms signed by Tunyung's principal along with attached exemption certificates.

10. The Division issued to petitioner a Notice of Determination (number 2429), dated November 9, 1984, for Article 12-A motor fuel tax due in the total amount of \$55,579.96, plus a \$5,558.00 penalty, for the total amount of \$61,137.96. On that notice, the Division indicated that the 370,069 gallons reported on line 22A (Dealer Sales to State and Municipalities) on Form MT-104 for April of 1984 was disallowed because credit was taken without approval. In the notice, the Division stated that at eight cents per gallon for 370,069 gallons, petitioner owed tax due in the amount of \$29,605.52 with respect to this disallowance.

11. The Division also issued to petitioner a Notice of Determination (number 2624), dated March 21, 1985, for Article 12-A motor fuel tax due in the total amount of \$86,082.90, plus \$12,912.44 in penalties, for the total amount of \$98,995.34. On that notice, the Division stated that petitioner had taken credit without approval on line 22A (Dealer Sales to State and Municipalities) on Form MT-104 for March 1984 and on line 4B of the March 1984 return. The Division asserted State tax due on 1,030,970 gallons at eight cents a gallon in the amount of \$82,477.60 and New York City tax due on 360,530 gallons at one cent per gallon in the amount of \$3,605.30. On the bottom of the notice, was the statement "For details refer to our letter of March 21, 1985."

12. The Division submitted into the record a March 21, 1985 letter addressed to NYFT from Arthur Bouchard of the Central Office Audit Bureau. The Division's counsel stated that the letter was found in the Division's case file on this case. The letter is not on Division letterhead and does not contain the signature of Arthur Bouchard. In the letter, an explanation is provided for the Division's disallowances of credit on Forms MT-104 for March and April of 1984. The following statements were included in that letter:

"You have entered a deduction of 1,030,970 gallons at Line #22A of the March return covering dealer sales to exempt agencies by Tunyung Fuel Oil Corp. Enclosed is an assessment covering this entry. Our records do not indicate that this transaction received prior approval from our department and further, credit for the bulk of this transaction was given Tuny ung [sic] Fuel Oil Corp. during a field

audit. Therefore, no credit should be taken on your return nor should you allow credit to them.

"The 370,069 gallons reported at Line #22A of your April return was included in our assessment #2429 since our department had not given prior approval. No credit for this gallonage was given Tuny ung [sic] Fuel Oil Corp. It is suggested that you advise them to forward to us for approval, both the original and duplicate of Form MT-338, the original exemption certificates and the original forms 1094. Note that the copies included with your return are not completed. Several of the 1094 forms necessary for sales to agencies of the United States Government are missing and many of the exemption certificates are not signed."

13. Petitioner's counsel, Carl Levine, objected to the admission of the March 21, 1985 letter on the ground that no foundation was laid for the admission of the evidence; that the letter was not signed and was not on the Division's letterhead; that he had no way of knowing how the letter got into the Division's file; and that Mr. Bouchard was not available for cross examination. The following discussion took place during the hearing:

"Administrative Law Judge ("ALJ"): Are you also stating you never received or have not seen this letter?

"Mr. Levine: I think I have seen something that looks very similar to this. I don't know if this is the letter.

The Administrative Law Judge permitted the Division to submit a post-hearing affidavit concerning the March 21, 1985 letter.

14. The Division's counsel, Mr. Matthews, submitted a post-hearing affidavit signed by Cliff Merchant, supervisor of the Fuel Desk Audit Unit of the Division's Transaction and Transfer Tax Bureau, who stated that he has knowledge of the past and current practices of the unit. In the affidavit, Mr. Merchant stated that Mr. Bouchard was no longer employed with the Division. He also explained that at the time the March 21, 1985 letter was written, it was the practice of the Fuel Unit to reference such letters on the notices issued, to mail a signed original of the letter to the taxpayer by regular mail, and to place an unsigned copy in the taxpayer's folder. Mr. Merchant also noted that because copies of letters at that time were made by means of carbon paper, the Division's letterhead did not appear on the copy.

15. By letter dated January 8, 1985, NYFT's counsel requested a copy of all the Division's workpapers and other documents upon which the Division based its determination of

motor tax due in the November 9, 1984 notice concerning the MT-104 statement for April 1984. Petitioner alleged in a subsequent petition it filed with the Division of Tax Appeals that the Division has not complied with this request by mailing workpapers to petitioner. In its answer to the petition, the Division asserted that it lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

16. After a conciliation conference, the conferee issued to petitioner a conciliation order, dated August 9, 1991, cancelling the penalties and interest on both notices, and sustaining the fuel tax due for March 1984 in the amount of \$86,082.90 (notice number 2624) and for April 1984 in the amount of \$29,605.22 (notice number 2429).

17. Petitioner filed a petition, dated November 6, 1991, alleging, inter alia, that NYFT paid all motor fuel taxes owed to the Division for March and April of 1984; that any underpayment that did exist, when balanced with NYFT's overpayments in prior and subsequent months, resulted in a net overpayment to the Division; that the motor fuel sold to Tunyung was resold to tax exempt purchasers and no motor fuel tax was due on such sales; that the Division's assessments are procedurally invalid because the notices failed to state that petitioner's tax returns had either not been filed or were incorrect or insufficient; and that petitioner's due process rights had been violated by the Division's failure to provide adequate notice of the methods and basis of its tax determination. Petitioner alleged that with the exception of the notices, the Division failed to provide NYFT with adequate notice of the method(s) and basis(es), if any, of the determination of taxes due; that only after a telephone conversation with Mary Lou Paley and Arthur Bouchard, the Division's auditors, did NYFT have an inkling as to the reason(s) for the alleged deficiencies; that the manner in which the Division provided notice to it of the alleged deficiencies has seriously prejudiced NYFT's ability to fully respond to the notices.

18. In the petition, NYFT alleged that according to Mr. Bouchard, Tunyung had previously been a licensed New York State motor fuel distributor who purportedly failed to pay to the Division more than a \$100,000.00 in motor fuel taxes, and that rather than crediting

NYFT with the motor fuel taxes that were not owed on sales to Tunyung for resale to exempt organizations, the Division applied these monies to satisfy this separate tax debt of Tunyung's to the Division.

19. In its answer, dated January 14, 1994, the Division denied the allegation that it applied the credit owed to NYFT to satisfy a prior tax debt of Tunyung's. The Division also affirmatively stated that Tunyung was not a registered distributor of motor fuel in the State of New York and that petitioner was not permitted to sell motor fuel to an unregistered distributor without collecting the motor fuel tax due from the purchaser; that petitioner's March and April 1984 MT-104 reports did not disclose any sales of fuel during those months to Tunyung; that Tunyung did not get the proper approval under the Division's regulations for petitioner to credit Tunyung's account for motor fuel taxes owed.

SUMMARY OF THE PARTIES' POSITIONS

20. In brief, petitioner continues to object to the admission of the March 21, 1985 letter on the ground that it was unable to cross examine the author of the letter and that without the proper foundation the letter is mere hearsay evidence that should be given no consideration. Petitioner notes that in his affidavit, Cliff Merchant offered no proof that a signed original letter was actually mailed to NYFT or that he was employed by the Division in 1984 so as to have first hand knowledge of the Division's practices during that time period. Petitioner further argues that the Bouchard letter's reference to a credit given to Tunyung is hearsay and that the Division has produced no evidence to explain why a credit was given to Tunyung for taxes it never paid, or to document that such payments or credits were granted to Tunyung. Petitioner also contends that NYFT does not owe any taxes on the gallons of motor fuel it sold to Tunyung which were resold to municipalities and that there is substantial uncontroverted evidence that all the motor fuel it sold to Tunyung during the period in question was resold to municipalities.

21. The Division argues that a credit is a form of exemption for which the taxpayer bears the burden of proving entitlement. In this case, argues the Division, petitioner must show (1) that the Division did not allow to Tunyung the bulk of the credit underlying the deficiency for

March 1984; and (2) that the remaining transactions underlying petitioner's claimed credit for March 1984 and April 1984 are properly documented. The Division asserts that petitioner has not met its burden of proof because the same documentation was already rejected by Mr. Bouchard in 1985, none of the documents are originals as required by the Division, many of the necessary documents are missing and others are not signed, and the Division does not have the ability to audit the underlying transactions at this late date. The Division points out that petitioner ignored the instructions of Mr. Bouchard, outlined in the March 21, 1985 letter, and that petitioner cannot now complain of difficulties that are a direct result of its refusal to follow prescribed procedures. The Division asserted that it gave Tunyung the credit assuming that payment had been or would be made to the Division; that the Bouchard letter instructed petitioner not to grant any credit to Tunyung and not to claim those credits on its own motor fuel return; that petitioner failed to follow the procedures under 20 NYCRR former 411.5 and that any negative consequences to petitioner resulted from its failure to follow these procedures.

22. In its reply brief, petitioner argues that there are no applicable statutes or regulations to which petitioner failed to adhere. Specifically, petitioner noted that former regulation section 411.5 did not specify how a supplier must report its sales to a dealer who resells to municipalities, did not prohibit a supplier from taking credits in such a situation, did not require NYFT to obtain prior approval from the Division before it could take credits on its MT-104 forms for sales to Tunyung, and did not impose a duty on a supplier to ensure that its customer followed the procedures of this regulation. Petitioner further contends that there is no evidence that the Division gave Tunyung any credit on its purchases of motor fuel from NYFT; that the exemption certificates it submitted into the record are fully executed or are accompanied by a valid executed blanket exemption certificate from the municipalities; and that the Division does not identify which exemption certificates are allegedly inadequate.

23. In March and April of 1988, NYFT sold approximately 7,000,000 gallons of motor fuel to Tunyung. For these sales, petitioner billed Tunyung approximately \$4,300,000.00 for the motor fuel, plus \$547,235.30 in motor fuel taxes and \$376,224.30 in sales tax. Under Tax Law §§ 284 and 1102, NYFT was required to prepay the eight cents per gallon for motor fuel tax and applicable sales taxes (First Import Law, L 1985, ch 44). Accordingly, in 1988, petitioner prepaid approximately \$547,235.30 in motor fuel taxes.

24. Tunyung defaulted on its payment for the motor fuel. Tunyung made one payment in March or April of 1988 in the amount of \$102,931.25. Mr. Blatt, NYFT's accountant, applied the payment to the earliest invoice in March 1988 thereby reducing by \$8,057.38 the sales tax Tunyung owed to NYFT leaving unpaid sales tax owed to NYFT in the amount of \$376,224.30. By April 1989, Mr. Blatt determined that based on the lack of activity on the Tunyung account for over a year, Tunyung's debt for the March and April 1988 motor fuel sales was uncollectible and should be considered a bad debt.

25. On May 11, 1989, NYFT served Tunyung with a summons commencing an action to enter judgment against Tunyung on the bad debt. On August 21, 1989, the judgment was entered in New York State Supreme Court, Kings County, for NYFT in the amount of \$5,343,818.67, plus interest and costs, for the total amount of \$7,277,169.72. NYFT was not able to collect any monies on that judgment.

26. NYFT filed a MT-104 return, dated May 16, 1989, for the month of April 1989 reporting a credit, in the amount of \$547,235.30, against a \$427,760.56 motor fuel tax liability for April 1989. NYFT also filed an FT-945 form, dated May 16, 1989, wherein NYFT took a credit, in the amount of \$376,224.30 for the sales tax NYFT prepaid in 1988 due to Tunyung's bad debt, against its prepaid sales tax liability (\$347,315.02) for the month of April 1989. The Division submitted into the record a letter, dated May 31, 1989, on Division letterhead to NYFT from James F. Bennett. The letter was unsigned. In that letter, Mr. Bennett advised NYFT that it improperly took a credit adjustment on its motor fuel tax return for April 1989 in the amount

of \$547,235.30 covering bad debts made to Tunnyung in prior months. Mr. Bennett noted that under Article 12-A, there was no provision for recovery of motor fuel tax included in bad debts.

27. NYFT filed its 1988 U.S. Corporation Income Tax return (Form 1120), dated February 15, 1990, reporting Tunnyung's debt to NYFT for March and April of 1988 as an uncollectible bad debt.

28. The Division issued to petitioner a Notice of Determination, dated January 8, 1990, for motor fuel tax due in the amount of \$427,760.54, plus a \$28,261.39 penalty and \$72,719.25 in interest, for the total amount of \$528,741.20. The Division submitted into the record a letter, dated January 8, 1990, to NYFT on the Division's letterhead from James F. Bennett. The letter was unsigned. In that letter, he stated that petitioner improperly took a credit adjustment for bad debts to Tunnyung inasmuch as there is no provision under Article 12-A for recovery of motor fuel tax included in bad debts. Mr. Bennett explained that because the April 1989 motor fuel return reflected a \$427,760.56 tax due before NYFT took the credit in error, there was additional tax due for that amount plus penalty and interest.

29. Petitioner's counsel objected to the admission of the January 8, 1990 letter and the May 31, 1989 letter from James Bennett on the ground that they were unsigned and no foundation was laid for their admission. The Administrative Law Judge allowed the Division to submit a post-hearing affidavit with respect to the letters.

30. The Division submitted a post-hearing affidavit signed by James F. Bennett in which he stated that during the time he was assigned to the Transaction and Transfer Tax Bureau, he conducted a desk audit of NYFT's motor fuel return for the month of April 1989. He stated that he explained the results of the audit to NYFT in the letters dated May 31, 1989 and January 8, 1990; that to the best of his knowledge these letters were mailed to the taxpayer by regular mail; and that it was his practice to place an unsigned copy of letters sent to a taxpayer in the taxpayer's permanent folder.

31. The Division also issued to petitioner a Notice of Determination, dated January 31, 1990, for sales and use tax due on motor fuel sales in the amount of \$347,315.02, plus a

\$59,043.55 penalty and interest of \$26,660.77, for the total amount of \$433,019.34 for the period April 1, 1989 through April 30, 1989.

32. By letter dated December 21, 1990, petitioner's counsel, Carl Levine, requested the Division to abate the penalties and reduce the interest asserted in the Notice of Determination for sales tax due. In the letter, Mr. Levine also enclosed payment of the sales tax due in the amount of \$415,592.69 which included the entire tax due and interest but did not include the penalty. In that letter, Mr. Levine stated that NYFT disagreed with the Notice of Determination but, at the same time, recognized that there had been some "procedural problems in connection with the initial taking of the now disallowed credit. . . ."

33. NYFT thereafter filed FT-945 forms claiming a credit for prepaid sales tax against its sales tax liability for the months of November and December of 1990. This claim involved the same uncollectible debt that petitioner had claimed as a credit on its FT-945 form for the month of April 1989. The Division again rejected petitioner's bad debt credit and issued to petitioner a notice of determination for sales tax due for the months of November and December of 1990. This notice became the subject of review in Matter of New York Fuel Terminal Corp. (Tax Appeals Tribunal, October 26, 1995). The Tribunal held that NYFT could credit the prepaid sales tax against its sales tax liability for the months of November and December of 1990 because the prepaid tax constituted an uncollectible bad debt.

34. By letter dated April 4, 1991, the Division responded to Mr. Levine's December 20, 1990 letter stating that his disagreement with the assessment in the notice for sales tax due should have been addressed by requesting a conciliation conference which was not done within the required 90 days of the notice. The Division informed petitioner that as of the date of the letter the current amount due was \$98,068.66, which included only the penalty and interest inasmuch as petitioner had paid the sales tax liability.

35. After a conciliation conference with the Bureau of Conciliation and Mediation Services, the conferee issued a conciliation order, dated August 9, 1991, sustaining the Notice of Determination, dated January 8, 1990, which asserted motor fuel tax due. However, the

Bureau of Conciliation and Mediation Services issued a conciliation order, dated August 30, 1991, denying a request for a conciliation conference with respect to the Notice of Determination, dated January 31, 1990, for sales and use tax due on the ground that the request for a conference was not received until July 1, 1991, a date in excess of the 90 days required for filing such a request.

36. NYFT filed a petition (DTA No. 810140), dated November 4, 1991, arguing that its claim for credit due to an uncollectible bad debt against the April 1989 motor fuel tax was supported by the statutes and regulations. In the alternative, petitioner argues that if it is not entitled to the credit, then the penalty should be abated.

37. The Division filed an answer, dated November 10, 1993, affirmatively stating that there is no entitlement to a refund or credit of motor fuel tax for uncollectible debts and that petitioner must establish reasonable cause for failing to pay the motor fuel tax for April 1989 in order to have the penalty abated.

38. Petitioner filed a reply, dated December 6, 1993, asserting the affirmative defenses that the answer was improperly and untimely served.

39. NYFT also filed a petition (DTA No. 810253), dated November 25, 1991, arguing that that it has demonstrated reasonable cause for nonpayment of the sales tax for April 1989, and therefore, the Division of Tax Appeals should review the merits of its application to abate the penalties.

40. The Division filed an answer, dated November 10, 1993, affirmatively stating that petitioner improperly claimed credits against its sales tax liability for uncollectible bad debts and that petitioner did not timely request a conciliation conference to protest the penalty imposed.

41. Petitioner filed a reply, dated December 6, 1993, asserting the affirmative defenses that the answer was improperly and untimely served.

42. In a stipulation, dated April 10, 1996, signed by the parties, petitioner withdrew its affirmative defenses that the answers were untimely served and the Division withdrew its claim that petitioner's protest in DTA No. 810253 was untimely filed.

SUMMARY OF THE PARTIES' POSITIONS

43. In brief, petitioner argues that Tax Law § 289-f and the Tax Appeals Tribunal's decision in a related case, Matter of New York Fuel Terminal Corp. (October 26, 1995), supports its theory that prepaid motor fuel tax deemed uncollectible may be taken as a credit against its motor tax liability as a bad debt; that its determination that the tax was uncollectible as a bad debt was not premature; and that it acted reasonably, in good faith and without willful neglect when it reported the prepaid motor fuel tax and prepaid sales tax on its returns for April 1989.

44. The Division argues that there is no provision in the Tax Law or regulations which authorizes a bad debt write-off against an Article 12-A liability in contrast to the sales tax law and regulations which specifically provide for such a write-off; that Tax Law § 289-f was intended to simplify the paperwork requirement of distributors and was not intended to alter the substance of the law; that even if the statutes or regulations permitted such a write-off, petitioner did not follow the procedures to establish that the debt was uncollectible; and that although the Tribunal decision in Matter of New York Fuel Terminal Corp. (supra) held that a distributor of motor fuel may receive credit for prepaid sales tax that is uncollectible as a bad debt, petitioner received the same credit for a later period and was not entitled to it on its April 1989 return, therefore, there is no reasonable cause to abate the penalty.

45. In its reply brief, petitioner contends that the Tribunal already decided in Matter of New York Fuel Terminal (supra) that the Tunyung account was a bad debt and uncollectible and therefore the doctrines of collateral estoppel and stare decisis apply; that even if these principles do not apply, it had satisfied the condition that the account was uncollectible for Federal tax purposes as required in 20 NYCRR 534.7(d)(1); that NYFT was not obligated to claim the credit on its MT-104 form in the same year it deducted the Tunyung bad debt on its

Form 1120; that it relied on the well-thought-out advice of its experienced accountant and reasonably concluded that the debt was uncollectible; that the Division's proposition that the Tribunal decision in New York Fuel Terminal is not applicable to prepaid motor fuel taxes is unavailing; and that the Division's attempt to trivialize the importance of Tax Law 289-f is disingenuous.

CONCLUSIONS OF LAW

DTA No. 810139

A. As noted by the Division's counsel, a tax credit is a form of exemption for which the taxpayer bears the burden of proving entitlement (see, Matter of Golub Service Station, Inc., 181 AD2d 216, 585 NYS2d 864, 865). In the introductory section of the regulations covering sales to exempt purchasers (20 NYCRR former 411.1), it is stated that in order to establish that any sale of motor fuel is nontaxable, "a distributor or dealer must strictly comply with the following regulations." According to 20 NYCRR former 411.4, a registered distributor who sells motor fuel to an exempt purchaser¹ may deduct the quantity sold in arriving at the net gallonage taxable on the monthly return and has one year in which to claim credit for sales made directly to an exempt purchaser.

Former section 411.5 covers tax-free sales by dealers who are not registered distributors. According to the regulation, dealers "shall make all claims for reimbursement on forms MT-338 and shall forward such forms to the Miscellaneous Tax Bureau" of the Division. Under the regulation, if the claim is approved, "one copy will be stamped 'Credit Approved' and returned to the dealer, who may present the same to his supplier for credit. The distributor, in turn, shall include this credit as a deduction in his monthly return." Former section 411.11, entitled "Dealers' reports to the

State", provides that the dealer shall prepare and send, with a duplicate copy, to the Division form MT-338 showing all tax-free sales and deliveries of motor fuel, and that when the

¹An exempt purchaser is defined in former section 411.2 as governmental entities of the United States, the State of New York, or municipalities or diplomatic or consular officers.

Division approves the claims, an approved copy of the MT-338 will be returned to the dealer as outlined in former section 411.5. Former section 411.5 further provides that the approved copy may then be presented by the dealer to his supplier for credit and that "[i]n no case will a distributor allow credit to a dealer more than one year after the date of approval shown on form MT-338."

Former section 411.12, entitled "Distributors' deduction for credit to dealer", provides:

"When the dealer files the approved form MT-338 with the distributor, as outlined in former sections 411.5 and 411.11, the distributor shall include the gallonage on which credit is based as a deduction on his monthly return. The gallonage shall be reported in schedules E and F and deducted on lines 22 and 22A of the monthly return."

Contrary to petitioner's claims in its reply brief, the regulations set forth the procedures with which both a dealer and distributor must strictly comply. According to these regulations, a distributor, such as NYFT, was entitled to deduct a credit to the dealer on its monthly MT-104 returns only after the dealer obtained the approved copy of the MT-338 form from the Division. Clearly, petitioner did not comply with the procedures set forth in the regulations. The purpose of the procedures in the regulations was to ensure that the distributor not take a credit for tax-free sales made by the dealer until the Division had the opportunity to examine and approve the underlying dealer transactions as exempt sales.

B. As noted above, petitioner objects to the admission into the record of the March 21, 1985 letter from Mr. Bouchard explaining the reasons for disallowing the credit taken on the MT-104 forms for March and April of 1984. In that letter, Mr. Bouchard stated that NYFT did not get prior approval for the credit from the Division and that credit was already given to Tunyung during a field audit for the motor fuel listed on the monthly report for March. Based on the fact that the letter was in the Division's case file, and on the affidavit of Cliff Merchant explaining the reason for the absence of the Division's letterhead on the letter and the Division's practice of keeping unsigned copies of letters sent to taxpayers, the letter was properly admitted as the March 21, 1984 letter referenced in the Notice of Determination (notice number 2624).

Although this letter states the basis for the Division's disallowance of the credit, it cannot constitute a valid reason for the disallowance or serve as evidence that the Division had already credited Tunyung for the same gallons of motor fuel claimed on petitioner's MT-104 form for March 1984. The reference to the credit in the March 21 letter is vague and constitutes hearsay information that is not sufficiently probative by itself to serve as a basis for the disallowance or as a basis requiring petitioner to bear the burden of disproving that Tunyung received a credit for the same transactions (cf., Matter of Flanagan v. New York State Tax Commission, 154 AD2d 758, 546 NYS2d 205). Mr. Bouchard was not available for cross examination on this issue and the Division presented no other evidence, such as documents, affidavits or testimony, to explain the vague reference in the March 21, 1994 letter to the alleged credit given Tunyung in a field audit. There is no information in the record as to the amount of the alleged credit given to Tunyung, in what field audit this credit was given, or whether the credit was properly applied to the account relating to the exempt sales.² Besides the introduction of the March 21 letter, the only other reference to this alleged credit is found in the Division's brief which in turn refers only to the March 21 letter. Although the taxpayer has the burden of proving entitlement to a credit, sufficient notice of the grounds for the disallowance must exist before the taxpayer assumes the burden of proving a negative.

C. With respect to the second ground offered by the Division for the disallowance of the credit, petitioner argues that the Division's disallowance, on the ground that the credits were not approved in advance in accordance with the regulations, elevates form over substance; and that NYFT has provided adequate proof that it is entitled to the credit for Tunyung's sales to exempt municipalities. Specifically, petitioner alleges that the number of gallons of motor fuel NYFT sold to Tunyung, as evidenced by the invoices it submitted, agrees with the number of gallons of motor fuel that Tunyung sold to municipalities, as evidenced by the MT-338 forms and the exempt certificates. This allegation is not supported by the evidence. As noted in Findings of

²Petitioner speculated in its petition that, based on a telephone conversation with Mr. Bouchard, the credit was applied to satisfy a separate liability of Tunyung's unrelated to the exempt sales (see, Finding of Fact "18").

Fact "4" and "5", the total number of gallons reported on the delivery invoices to Tunyung for the months of January through April 1984 were 1,361,327, whereas the total number of gallons reported on the MT-338 forms for January through April 1984 were 1,401,039.4. There is no explanation in the record for this discrepancy. Therefore, any credit to petitioner cannot exceed the number of gallons evidenced in the delivery invoices to Tunyung.

This total number of gallons also does not correspond to the total number of gallons reported on line 18 of each of the MT-104 forms. On line 18 of the March 1984 MT-104, petitioner reported 1,077,856 gallons, and on line 18 of the April 1984 MT-104, petitioner reported 887,574 gallons. In its brief, petitioner asserted that these gallons represented the number of gallons of motor fuel it sold to Tunyung during this period (Petitioner's brief, p. 8).

Contrary to petitioner's assertion, the delivery invoices do not establish a nexus or chain of evidence to confirm that the motor fuel sold by NYFT to Tunyung was the same motor fuel sold by Tunyung to the exempt municipalities. There is no indication on the delivery invoices to Tunyung where the motor fuel was delivered. In fact, the delivery invoices have a blank space next to the heading "delivered to". Furthermore, Mr. Blatt's testimony concerning the direct delivery of the motor fuel by NYFT's affiliate, M & Q Trucking, to the municipalities is equivocal, at best. There are no documents from M & Q Trucking to verify direct delivery from NYFT to the municipalities listed on Tunyung's MT-338 forms. Inasmuch as M & Q Trucking is an affiliate of NYFT's, such records or work orders should not have been difficult to obtain.

Petitioner asserts that proof exists because the number of gallons recorded on Tunyung's MT-338 forms from January 1984 through April 1984 is the same as the total number of gallons for which petitioner claimed credit on its MT-104 forms for March and April of 1984. Without the Division's approval stamp on the MT-338 forms, however, these documents represent conclusory statements unless they can be verified. Although the exemption certificates verify that Tunyung sold motor fuel to exempt organizations, as reported on the MT-338 forms for the months of January, February and March of 1984, exemption certificates support only 252,406.0 of the gallons of motor fuel listed on Tunyung's MT-338 form for April 1984. The question is

whether Tunyung's listing NYFT as the distributor on the MT-338 forms substantiates that the motor fuel sold by Tunyung to exempt organizations was the same motor fuel sold by NYFT to Tunyung.

The MT-338 forms signed by Mr. Quock constitute evidence supporting petitioner's claim that motor fuel it sold to Tunyung was resold to exempt organizations. The Division had the opportunity to examine the allegations contained in the MT-338 forms signed by Tunyung's principal. In the March 21 letter, Mr. Bouchard advised, with respect to the April 1984 return, that petitioner have Tunyung send to the Division the original MT-338 form and exemption certificates. Mr. Bouchard also noted that many of the exemption certificates were missing. No where in that letter does Mr. Bouchard question whether NYFT was properly listed as the distributor of the motor fuel in question.

In brief, the Division argues that the purpose of the regulations was to allow the Division to make a determination regarding the sufficiency of exemption documentation; however, the Division does not attack the veracity of the exemption documents in the record. Instead, it argues that the regulations were not followed, and that the exemption documents in the record were "presumably" the same documents submitted to Mr. Bouchard who rejected the credit because some exemption certificates were missing. The Division also notes that the originals were not provided as requested by Mr. Bouchard, and therefore, the Division does not have the ability at this time to audit the underlying transactions. The flaw with this argument is that the Division did have the opportunity to approve the MT-338 forms when they were reviewed by Mr. Bouchard during the field audit. At the time of the audit, to deny the credit on the ground that prior approval had not been obtained, appears to elevate form over substance when a review could have been made at that time of the exemption certificates presented. The question is whether petitioner is entitled to the credit for those transactions that are supported by exemption certificates.

Despite Mr. Bouchard's requests, from the evidence before me, it appears that petitioner relied in good faith on Tunyung's representations that the motor fuel Tunyung purchased from

NYFT was resold to tax exempt agencies as verified by the copies of the exemption certificates in the record (see, Matter of International Petroleum Traders, Inc., Tax Appeals Tribunal, March 24, 1994, see also, 20 NYCRR 3000.15[d][2] [copies of documents permitted]). Based on these certificates, petitioner was entitled to credit for motor fuel taxes paid on 1,030,970 gallons reported on the MT-104 form for March 1984 and on 252,406 gallons of the 370,069 gallons reported on the MT-104 for April 1984.

DTA Nos. 810140 and 810253

D. Petitioner relies on the Tax Appeals Tribunal's holding in Matter of New York Fuel Terminal Corp. (supra) to support its claim that a distributor may receive credit for prepaid motor fuel taxes on motor fuel sales that are uncollectible as a bad debt. In that case, the Tribunal rejected the Administrative Law Judge's determination that Tax Law § 1120, which was enacted specifically to provide for refunds and credits with respect to motor fuel, does not include a credit for bad debts in contrast to Tax Law § 1132 which allows for a credit for bad debts. Based on this statutory analysis, the Administrative Law Judge held that prepaid sales tax on motor fuel could not be the subject of a credit for bad debts. The Tribunal reversed this determination and held that the legislative intent expressed in Tax Law § 1102(b) indicated that the provisions of Article 28 apply to the prepaid sales tax on motor fuel under section 1102(a).

Petitioner argues that similar to prepaid sales tax on motor fuel, prepaid motor fuel tax is also the subject of a credit for bad debt. Petitioner also contends that based on the doctrine of collateral estoppel, the holding and findings in Matter of New York Fuel Terminal establish that the Tunyung account was an uncollectible bad debt, and therefore, it was reasonable for NYFT to claim a bad debt credit for prepaid sales tax on its return for April 1989 thereby providing justification for abatement of penalty.

"Collateral estoppel, or issue preclusion, may be invoked in a subsequent action or proceeding to prevent a party from relitigating an issue decided against that party in a prior adjudication" (Staatsburg Water Company v. Staatsburg Fire District, 72 NY2d 147, 152, 531 NYS2d 876,878, citing Ryan v. New York Tel. Co., 62 NY2d 494, 478 NYS2d 823;

Schwartz v. Public Adm'r, 24 NY2d 65, 298 NYS2d 955.) This doctrine is applicable to give conclusive effect to determinations of administrative agencies; however, "in that context the doctrine is applied more flexibly, and additional factors must be considered . . ." (Allied Chemical v. Niagara Mohawk Power Corp., 72 NY2d 271,276, 532 NYS2d 230,232, cert denied 488 US 1005, 102 L Ed 2d 777). Those additional factors include inquiries such as whether the agency has the statutory authority to act adjudicatively and "whether the procedures used in the administrative proceeding assured that the information presented to the agency were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired." (Id.)

In this case, there is no doubt that the same debt by Tunyung was the subject of both the present proceeding and the case decided by the Tribunal and that both proceedings involved the same parties who had an opportunity to litigate fully the issues before them. The Tribunal established that the Tunyung account for the March and April 1988 motor fuel sales was an uncollectible bad debt. The issues, however, that were not litigated by the parties in the prior proceeding are (1) whether prepaid motor fuel tax may be subject to credit or refund on the ground that the tax and motor fuel sales upon which the tax was based were uncollectible as bad debts, and (2) whether there was reasonable cause to abate the penalty imposed for petitioner's claimed bad debt credit on its April 1989 return for prepaid sales tax on motor fuel.

E. Petitioner argues that the Tribunal's holding in Matter of New York Fuel Terminal with respect to prepaid sales tax on motor fuel is readily applicable to prepaid motor fuel tax under Article 12-A. Petitioner also relies on Tax Law § 289-f as authority for the proposition that prepaid motor fuel tax, like prepaid sales tax on motor fuel, is subject to credit or refund when the tax is uncollectible as a bad debt.

Section 289-f of Article 12-A, entitled "Joint administration of taxes", provides that the tax commission has the authority to make regulations for the joint administration of taxes imposed under Articles 12-A, 28 and 29 upon the sale of motor fuel including the reporting and refunding of such taxes. As noted by the Division's counsel, the legislative intent underlying

the enactment of section 289-f was to simplify the administration of State and local taxes, aid in the detection of untaxed gasoline and "to provide for the joint administration of the motor fuel and sales and compensating use taxes and the filing of motor fuel tax returns on the twentieth day of a month, the due date of the sales tax returns" (Executive Dept. Mem, 1985 McKinney's Session Laws of NY, at 2955 - 2956).

The Tribunal, in its holding in New York Fuel Terminal, relied on sections 1102 and 1132(e) in Article 28 of the Tax Law. Section 1132(e) specifically permits a vendor a credit against sales tax due on a subsequent tax return for sales tax paid on items that have been returned or when the customer has not paid for the item and the charge has been ascertained to be uncollectible. The Tribunal reasoned that section 1132(e) applied to motor fuel distributors because section 1102 indicates that the provisions of Article 28 are intended to apply to the tax required to be prepaid pursuant to section 1102(a) unless the provision is inconsistent or not relevant to the prepaid tax.³

The Tribunal found that a credit for bad debts is not inconsistent or irrelevant to the prepaid tax. The Tribunal reasoned that

"[t]he distributor who is required to prepay the tax but who has not been paid by his customer is in the same economic position as the retail vendor who has paid over the sales tax to the Division but who has not been paid by his customer. The distributor and retail vendor are each required to pay the tax to the Division and are required to collect the tax from their

customer (Tax Law §§ 1102[c] and 1132[a]; see also, 20 NYCRR 561.1[b][1]). If the customer does not pay, the distributor and the retail vendor are each left bearing the burden of the tax contrary to the scheme intended by Article 28. Thus, in each case the credit for bad debts would act to remove a tax burden which has come to rest in the inappropriate place in the chain of transactions."

In contrast to this taxing scheme under Article 28, there are no comparable provisions under Article 12-A to justify a credit for a bad debt with respect to prepaid motor fuel tax.

³Section 1102(b) provides that prepaid sales tax on motor fuel shall be administered and collected in a like manner as the imposition of sales and use taxes under sections 1105 and 1110. Section 1102(b) also provides, in pertinent part, that:

"Such provisions shall apply with the same force and effect as if the language of those provisions have been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section."

Article 12-A does not contain a provision to allow a distributor to obtain a credit or refund for prepaid motor fuel tax where the distributor is not paid by the customer for the motor fuel. Moreover, section 289-f, under Article 12-A, does not provide authority (as does section 1102[b] with respect to prepaid sales tax for motor fuel) that the provisions of Article 28 apply to those of Article 12-A. Therefore, there is no statutory authority for petitioner to receive a credit for prepaid motor fuel tax.

F. Under Tax Law § 289-b(c), the penalty for failure to pay tax in a timely manner may be waived if such failure or delay was due to reasonable cause and not due to willful neglect. The regulations provide examples of grounds for reasonable cause, none of which apply here, and further provide that "[a]ny other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause." (20 NYCRR 416.3[c][5].) The regulations state that ignorance of the law is not considered a basis for reasonable cause.

Here, although petitioner argues that this case involves an issue of first impression, there was no statutory provisions on which petitioner could have reasonably relied for authority to claim the credit with respect to prepaid motor fuel tax. The fact that petitioner relied on the advice of its accountant is no basis for reasonable cause (see, Matter of Auerbach v. State Tax Commission, 142 AD2d390, 536 NYS2d 557, 561).

G. Petitioner claims that there was reasonable cause for it to claim a bad debt credit on the April 1989 return for prepaid sales tax with respect to motor fuel sales to Tunyung in March and April of 1988. Clearly, the Tribunal holding in Matter of New York Fuel Terminal (*supra*) established that distributors are entitled to a credit with respect to prepaid sales tax on motor fuel sales that are uncollectible. The Tribunal holding also established that the Tunyung account for motor fuel sales in March and April of 1988 became an uncollectible bad debt. However, the issue here is whether petitioner established that it was reasonable to claim a bad

debt credit on the April 1989 return rather than on subsequent returns which the Tribunal ultimately permitted in the New York Fuel Terminal case.

Relying on Matter of People's Oil Co. (Tax Appeals Tribunal, December 8, 1988), the Division argues that as of April 1989, petitioner did not comply with the applicable regulations to qualify for a bad debt credit against sales tax liability. In Matter of People's Oil Co., the Tribunal stated :

"Among the stated conditions for obtaining a credit for a bad debt is that the debt must be actually charged off for Federal income tax purposes (20 NYCRR 534.7[d][1]). . . . [T]he record indicates no evidence that the petitioner did actually charge off the debt for Federal income tax purposes. Given the wide latitude granted to the Division by section 1132(e) of the Tax Law to prescribe the conditions for the granting of a bad debt credit, and since this condition, requiring the taxpayer to conform his sales tax treatment to his income tax treatment, is an appropriate requirement, petitioner's failure to satisfy this condition is fatal to his claim for a bad debt credit."

As noted above, 20 NYCRR 534.7(d)(1) provides that "[n]o credit or refund may be sought until an account has been found to be uncollectible and has been actually charged off for federal income tax purposes." In this case, based on Mr. Blatt's testimony, it was reasonable for petitioner to believe that Tunyung's debt was uncollectible at the time it reported a credit on the April 1989 return even though it had not applied for a judgment on the debt until May 11, 1989 and had not entered the judgment until August 21, 1989. The regulations provide that legal action to enforce payment is not a necessary prerequisite in determining worthlessness (20 NYCRR 534.7[a][1]). However, NYFT did not report the debt on its 1988 U.S. Corporation Income Tax return until it filed the return in February of 1990. Thus, petitioner failed to follow the procedures set forth in the regulations, and accordingly, was not entitled to the bad debt credit on the April 1989 return (see, Matter of People's Oil Co., *supra*).

Petitioner's claims of good faith payment of the tax after the Notice of Determination was issued, and the fact that the underlying credit concerned an issue of first impression do not establish reasonable cause for claiming the credit on the April 1989 return (see, Matter of Copley Plaza Company, Tax Appeals Tribunal, June 8, 1989). Inasmuch as NYFT was on notice by the regulations as to the conditions for claiming a bad debt credit, there is no

reasonable cause to abate the penalty in this matter. As noted above, because petitioner has paid the sales tax liability contained in the Notice of Determination, dated January 31, 1990, petitioner is only liable for the penalty and interest on that penalty.

H. The petition of New York Fuel Terminal Corp. in DTA No. 810139 is granted and the Notices of Determination, dated November 9, 1984 and March 21, 1985, are cancelled.

I. The petitions of New York Fuel Terminal Corp. in DTA Nos. 810140 810253 are denied and Notice of Determination, dated January 8, 1990, is sustained and the Notice of Determination, dated January 31, 1990, as modified in Conclusion of Law "G", is sustained.

DATED: Troy, New York
February 20, 1997

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE